Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
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No. 82-786

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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(Counsel of Record for Petitioner)

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PETITION FILED: November 8, 1982
CERTIORARI GRANTED: May 2, 1983

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RELEVANT DOCKET ENTRIES

In the Matter of: Grand Jury Empanelled March 19, 1980

Docket: Misc. 80-53

DATE	FILINGS—PROCEEDINGS
4-9-80	Ordered minutes and record sealed. (Biunno) (4-2-80)
4-11-80	Ordered minutes and stenographic notes sealed. (Biunno) (4-9-80)
4-24-80	Copy of CJA Order appointing Pamela A. Falls, Esq., counsel for grand jury witness Victor Daniel Martinez, filed 4-23-80. (Perretti)
5-2-80	Copy of Voucher of Pamela A. Falls, Esq., for compensation and expenses on behalf of VICTOR DANIEL MARTINEZ filed 5-1-80. (Perretti)
5-14-80	Notice of Motion to quash grand jury subpoenas, etc., ret. 5-14-80, memorandum of law, and acknowledgment of service filed. * * * *
5-14-80	Ordered minutes, motion and court reporter's notes impounded until further order of court. (Meanor) (5-14-80$
5-16-80	Petition and Order for writ of habeas corpus re Michael Masucci filed 5-15-80. (Meanor)
5-16-80	Writ re Michael Masucci issued.
5-29-80	Petition and Order for writ of hebeas corpus re William A. Drennen filed 5-28-80. (Meanor)
5-29-80	Writ re William A. Drennen issued.
6-2-80	Affidavit and Order granting U.S. leave to disclose certain grand jury transcripts with sealing order filed 5-29-80. (Meanor) * * *
6-16-80	Notice of motion by Ernst Orthopedics, Inc. for an order quashing a subpoena duces tecum ret. 7-14-80, statement in lieu of brief and certificate of service, filed 6-13-70.
6-16-80	Affidavit of Peter R. Sarasohn, filed 6-13-80.
6-17-80	Notice of disclosure of matters occurring before grand jury with sealing order filed 6-16-80. (Meanor)

6-19-80 Notification of disclosure of matters occurring before grand jury with sealing order, filed 6-16-80. (Coolahan)

6-20-80 Order to show cause re compliance by Ernst Orthopedics, Inc., with Grand Jury subpoena, returnable 6-24-80 filed 6-19-80. (Coolahan)

6-20-80 Affidavit of Robert S. Bonney, Jr., filed 6-19-80.

6-20-80 Verified Petition, filed 6-19-80.

6-25-80 Hearing on application of U.S. why Ernst Orthopedics Inc. should not comply with Grand Jury subpoena served on May 29th, 1980. Ordered Ernst Orthopedics Inc. comply with subpoena upon return from Europe of the individual involved. Order to be submitted. (Coolahan) (6-24-80)

7-2-80 Copy of writ issued 5-29-80 re William A. Drennen with Marshal's return filed 7-1-80.

7-7-80 Notification of disclosure of matters occurring before the grand jury with sealing order filed 6-30-80. (Whipple) * * * *

7-11-80 Notification of disclosure of matters occurring before the grand jury with sealing order filed 7-7-80. (Whipple) * * *

7-8-80 Order for compliance with grand jury subpoena served upon Ernst Orthopedics, Inc. filed 7-8-80. (Coolahan)

7-16-80 Notification of disclosure of matters occurring before grand juries with sealing order filed 7-14-80. (Whipple)* * *

7-31-80 Order to show cause re judgment of civil contempt against Ernst Orthopedics, Inc. for failure to comply with court order of 7-8-80, ret. 7-30-80, filed 7-28-80. (Whipple) Notice mailed.

7-31-80 Verified petition, re judgment of civil contempt against Ernst, filed 7-28

7-31-80 Affidavit of Robert S. Bonney, Jr., filed 7-28-80.

7-31-80 Notification of disclosure of matters occurring before the grand jury with sealing order, filed 7-30-80. (Whipple) * * *

8-4-80 Hearing on government's application to hold witness, Ernst Orthopedics, Inc., in contempt of Court for failure to comply with Court Order to produce certain documents before the Grand Jury. Ordered application granted. (Whipple) (7-31-80)

8-4-80 Order holding Ernst Orthopedics, Inc. in civil contempt for failure to comply with court order of 7-8-80, etc., and denying request of Ernst Orthopedics, Inc. for stay, filed 7-31-80. (Whipple) Notice mailed.

8-6-80 Petition and order pursuant to Rule 6(e) and sealing order, filed 8-5-80. (Fisher) * * *

8-6-80 Affidavit, order and sealing order, filed. (Fisher) * * *

8-7-80 Ordered minutes impounded. (Fisher) (8-6-80)

8-19-80 Transcript of hearing taken on 7-31-80, filed 8-18-80.

8-21-80 Notice of motion of Disbrok Trading Co., Inc. and Fred Distenfeld for order quashing a grand jury subpoena or alternatively modifying subpoena and limiting disclosure of any documents, returnable 8-21-80 etc. filed 8-20-80. (brief submitted)

8-21-80 Affidavit of Charles S. Crandall filed.

8-22-80 Ordered minutes sealed. (Fisher) (8-21-80)

9-4-80 Hearing re penalty for civil contempt as to Ernst Orthopedics, Inc. Ordered penalty of $250.00 per day if documents are not produced by September 10, 1980. (Whipple) (9-3-80)

9-4-80 Hearing on application of Ernst Orthopedics, Inc., for stay. Ordered application denied. Order to be submitted. (Whipple) (9-3-80)

9-5-80 Order directing Ernst Orthopedics, Inc. to appear before the grand jury on Sept. 10, 1980 and produce documents or pay a fine of $250.00 a day to Clerk of the Court, etc.; and denying request for stay, filed 9-4-80. (Whipple)

9-9-80 Petition and Order for writ of habeas corpus re Anthony Pionzio filed. (Lacey)

9-8-80 Writ re Anthony Pionzio issued.

9-10-80	NOTICE OF APPEAL OF Ernst Orthopedics, Inc. filed 9-8-80, at 1:10 p.m.
9-10-80	Copies of Notice of Appeal of Ernst Orthopedics, Inc. sent to USCA, and U.S. Attorney. (USCP 80-2265)
9-11-80	Notification of disclosure of matters occurring before grand juries with sealing order filed 9-9-80. (Lacey)* * *
9-15-80	RECORD ON APPEAL SENT TO U.S.C.A. (NOTICE MAILED)
9-16-80	Notification of disclosure of matters occurring before grand juries with sealing order filed 9-11-80. (Lacey)* * *
9-16-80	Notification of disclosure of matters occurring before grand juries with sealing order filed 9-11-80. (Lacey)* * *
9-17-80	Transcript of Sept. 3, 1980, proceedings before Judge Whipple re Ernst Orthopedics, Inc. filed 9-15-80.
9-17-80	Order granting motion of Disbrok Trading Company, Inc. and Fred Distenfeld to quash subpoena except that they are required to produce records relating to Meg Import Corporation, et al, filed 9-16-80. (Fisher)
9-19-80	Motion of U.S. to compel Anthony Pionzio to give testimony filed 9-17-80. (No Brief)
9-18-80	Hearing on government's application for Court to grant immunity to Anthony Pionzio. Ordered application granted. (Lacey) (9-17-8)
9-19-80	Order compelling Anthony Pionzio to testify filed 9-17-80. (Lacey)
9-22-80	USCA Order granting motion of Ernst Orthopedics, Inc. for stay of enforcement of order and judgment in civil contempt, etc., filed 9-18-80.
9-23-80	ERNST ORTHOPEDICS, INC.—FIRST SUPPLEMENTAL RECORD ON APPEAL SENT TO USCA. (Notice mailed)

9-29-80 Hearing on application of Jerome Landzert to be excused from grand jury service as of the close of business on October 1, 1980. Ordered application granted. (Lacey) (9-24-80)

9-29-80 Copy of writ issued Sept. 8, 1980 re Anthony Pionzio with Marshal's return filed.

9-29-80 Order permanently excusing grand juror Robert Tamburri and directions that a replacement panel be summoned filed 9-26-80. (Lacey)

9-30-80 Affidavit filed.* * *

9-30-80 Order permanently excusing grand juror Jerome Landzert and directing that a replacement panel be summoned filed 9-29-80. (Lacey)

10-1-80 Notice of Motion of witness Frank Scarafile to quash or limit subpoena, brief and acknowledgement of service, filed 9-30-80.

10-1-80 Notice of Motion of witness John J. Powers, Esq., pro se, to quash or limit subpoena, brief and acknowledgement of service, filed 9-30-80.

10-1-80 Notice of Motion of witness Robert Menendez to quash or limit subpoena, brief and acknowledgment of service, filed 9-30-80.

10-1-80 Notice of Motion of witness John Bertoli to quash or limit subpoena brief and acknowledgment of service, filed 9-30-80.

10-1-80 Notice of Motion of witness William Musto to quash or limit subpoena, brief and acknowledgement of service, filed 9-30-80.

10-1-80 Notice of Motion of witness Richard Van Nortwick to quash subpoena, brief and proof of service filed.

10-1-80 Notice of Motion of U.S. to disqualify firm of Lewis and DeClemente from representing John Powers, John Bertoli, Frank Scarafile and/or Robert Menendez, filed. (No Brief)

10-1-80 Notice of Motion of John Powers, President, Union City Board of Education to quash or limit subpoena, brief and acknowledgment of service, filed.

10-3-80 Hearing on application of John Powers, pro se, joined by Menendez, Bertoli and Scarafile for recusal of Judge. Ordered hearing continued to October 3, 1980. (Stern) (10-1-80)

10-3-80 Notification of disclosure of matters occuring before the grand juries with sealing order filed 10-2-80. (Stern)* * *

10-3-80 Transcript of hearing taken on 10-1-80, filed 10-2-80.

10-6-80 Continued hearing on application of John Powers, pro se, joined by Menendez, Bertoli and Scarafile for recusal of Judge. Ordered application denied. (Stern) (10-3-80)

10-6-80 Hearing on government's application to release from impoundment affidavits of Gary F. White and James G. Cole. Ordered application granted. (Stern) (10-3-80)

10-6-80 Hearing on application of government to disqualify Lewis & DeClemente, Esqs. DECISION RESERVED. (Stern) (10-3-80)

10-6-80 Affidavit of Gary F. White, filed 10-3-80.

10-6-80 Affidavit of James G. Cole, filed 10-3-80.

10-6-80 Affidavit, filed 10-3-80.* * * (see Misc. 79-75)

10-6-80 Order re disclosure, filed 10-3-80. (Stern) * * * (See Misc. 79-75)

10-6-80 Order sealing affidavit and order re disclosure, filed 10-3-80. (Stern) * * * (See Misc. 79-75)

10-6-80 Affidavit of Mark J. Malone, filed 10-3-80.

10-6-80 Affidavit of Samuel Rosenthal, filed 10-3-80.

10-7-80 Notification of disclosure of matters occurring before the grand juries with sealing order, filed 10-6-80. (Stern) * * *

10-8-80 At call for hearing on motion of Richard Van Nortwick to quash subpoena, counsel indicated motion withdrawn. (Stern) (10-7-80)

10-8-80 Hearing on renewed application of Bertoli for recusal of Judge. Ordered application denied. (Stern) (10-7-80)

10-8-80 Continued hearing on application of government to disqualify the Law firm of Lewis & De Clemente, Esqs. Ordered application granted. Ordered firm of Lewis & DeClemente, Esqs. from representing anyone in these proceedings. (Stern) (10-7-80)

10-8-80 Hearing on application of Lewis & DeClemente, Esqs., by Thomas De Clemente, Esq. for a stay. Ordered application denied. (Stern) (10-7-80)

10-8-80 Ordered Compliance with subpoenas as to Bertoli and Scarafile stayed until October 21, 1980. (Stern) (10-7-80)

10-8-80 Affidavit of Richard Bertoli, filed 10-7-80.

10-8-80 Affidavit of Thomas A. De Clemente, filed 10-7-80.

10-8-80 Affidavit of John Bertoli, filed 10-7-80.

10-8-80 Notification of disclosure of matters occuring before the grand jury with sealing order, filed 10-7-80. (Stern) * * *

10-9-80 Hearing on application of John Powers to quash subpoena. Ordered application adjourned to October 14, 1980. (Stern) (10-8-80)

10-9-80 Hearing on application of William Musto to quash subpoena. Ordered application granted in part and denied in part. (Stern) (10-8-80)

10-9-80 Notification of disclosure of matters occurring before Grand jury with sealing order, filed 10-8-80. (Stern)* * *

10-10-80 Transcript of hearing taken on 10-3-80, filed.

10-10-80 Transcript of hearing taken on 10-7-80, filed.

10-10-80 Transcript of hearing take on 10-3-80, filed.

10-15-80 Continued hearing on application of John Powers to quash subpoenas. Ordered application granted in part, denied in part. (Stern) (10-14-80)

10-17-80 Order disqualifying firm of Lewis & DeClemente from representing any party or witness in connection with grand jury investigation, and denying motion of Thomas DeClemente, Esq. for a stay of order, filed 10-15-80. (Stern) Notice mailed.

10-17-80 Affidavit of Frank J. Scarafile, filed 10-15-80.

10-17-80 Affidavit of John Bertoli, filed 10-15-80.

10-17-80 Affidavit of Samuel Rosenthal, filed 10-15-80.

10-17-80 Affidavit of William W. Robertson, filed 10-15-80.

10-20-80 Notification of disclosure of matters occurring before grand juries with sealing order, filed 10-16-80. (Stern)* * *

10-20-80 Notification of disclosure of matters occurring before grand juries with sealing order, filed 10-16-80. (Stern)* * *

10-21-80 At call for continued hearing on application of witness, Frank Scarafile to quash subpoena; Frank Scarafile indicated application withdrawn. (Stern) (10-20-80)

10-21-80 Hearing on motion of Mickey Borack to quash subpoena. Ordered motion granted in part, denied in part. (Stern) (10-20-80)

10-21-80 Notification of disclosure of matters occurring before grand juries with sealing order filed 10-20-80. (Stern)* * *

10-22-80 Affidavit of AUSA Mark J. Malone re subpoena served on Mayor William Musto filed 10-21-80.

10-22-80 Motion of witness MIckey Borack to quash or limit a subpoena duces tecum filed 10-20-80.

10-23-80 Hearing on application of government (No Brief) (see, 10-21-80) to surrender certain documents to the grand jury or the Clerk under seal. Ordered hearing continued to October 29, 1980. (Stern) (10-21-80)

10-23-80 Motion of U.S. re immunization of witness Raymond Peto and to compel testimony filed 10-22-80. (No Brief)

10-23-80 Hearing on application of government to compel Raymond Peto to testify before the grand jury. Ordered application granted. (Stern) (10-22-80)

10-23-80 Order compelling witness Raymond Peto to testify before the grand jury filed 10-22-80. (Stern)

10-23-80 Affidavit of AUSA Mark J. Malone in response to request of Frank Scarafile re electronic surveillance filed 10-22-80.

10-23-80 Affidavit of AUSA Mark J. Malone in response to request of William Musto's re electronic surveillance filed 10-22-80.

10-23-80 Affidavit of AUSA Mark J. Malone in response to request of John Powers re electronic surveillance filed 10-22-80.

10-24-80 Order granting in part and denying in part motion of witness John J. Powers to limit subpoena filed. (Stern)

02-28-80 Hearing on government's application to compel Scipio L. Africano to testify before the Grand Jury. Ordered hearing continued to November 4, 1980. (Stern) (10-27-80)

10-29-80 NOTICE OF APPEAL OF witnesses Frank Scarafile and John Bertoli from Order (entered Oct. 17, 1980) disqualifying their counsel, Thomas A. DeClemente, Esq., from representing them filed 10-27-80, at 8:30 a.m.

10-29-80 Copies of Notice of Appeal of Frank Scarafile and John Bertoli sent to USCA and U.S. Attorney.

10-30-80 Transcript of hearing taken on 10-20-80, filed 10-29-80.

10-30-80 Motion of U.S. for an order compelling Mounir Hazzan to testify before the Grand Jury, filed 10-29-80.

10-31-80 Hearing on government's motion to compel testimony from Mounir Hazzan before the Grand Jury. Ordered motion granted. Order submitted. (Stern) (10-29-80)

10-31-80 RECORD ON APPEAL SENT TO U.S.C.A. (NOTICE MAILED)

11-3-80 Order compelling Mounir Hazzan to testify before the grand jury filed 10-29-80. (Stern)

11-3-80 Motion of I. Spiegel to quash grand jury subpoena returnable November 5, 1980, filed. (No Brief)

11-5-80 Certified copy of USCA Order discharging rule to show cause entered against U.S. and directing U.S. to exchange original records produced by Ernst Orthopedics, Inc. for copies, etc., filed 11-3-80.

11-6-80 Transcript of October 21, 1980, hearing before Judge Stern, re William Musto, filed 11-5-80.

11-6-80 Transcript of October 27, 1980, hearing before Judge Stern, re Union City Board of Education, filed 11-5-80.

11-6-80 Motion of Art Metal-U.S.A., Inc. to quash subpoena or for a protective order, proof of service, filed 11-5-80. (No Brief)

11-6-80 Ordered hearing on application of Art Metal U.S.A. to quash subpoean duces tecum or in the alternative for a protective order adjourned to Nov. 10, 1980, before Judge Stern. (Lacey) (11-5-80)

11-6-80 Hearing on motion of I. Spiegel to quash subpoena. Ordered hearing continued to November 10, 1980. (Stern) (11-5-80)

11-12-80 Motion of U.S. for Order to Show Cause holding witness William E. Slater in contempt for not fully complying with grand jury subpoena, proof of service, filed 11-7-80. (No Brief)

11-12-80 Certified copy of USCA Order amending USCA Order (entered 11-5-80) in that U.S. is permitted to retain original documents, if needed for laboratory or handwriting analysis, produced by Ernst Orthopedics, Inc., etc., filed 11-10-80.

11-13-80 Ordered grand jury minutes sealed. (Fisher) (11-12-80)

11-13-80 Affidavit filed 11-12-80.* * * *

11-18-80 Motion of Art Metal-U.S.A. Inc. to quash subpoean duces tecum or for a protective order, memorandum of law, proof of service, filed 11-14-80.

11-18-80 Transcript of hearing held Oct. 30, 1980, before Judge Biunno, filed 11-14-80.* * *

11-18-80 Continued hearing on motion of I. Spiegel to quash subpoena. Counsel indicated consent order to be submitted. (Stern) (11-17-80)

11-18-80 Hearing on motion of Art Metals to quash subpoena. Counsel indicated consent order to be submitted. (Stern) (11-17-80)

11-18-80 Order compelling Hugh Dietz to provide finger-
Hearing on motion of Art Metals to quash subpoe-
photographed and directing that they be placed in sealed envelope and deposited with Clerk filed 11-17-80. (Fisher)

11-18-80 Letter of S. Kenneth Jacobson, M.D. re grand jury witness Isadore Spiegel's copetency to testify filed 11-17-80.

11-20-80 Hearing on application of Government to grant immunity to Merle Betskoff. Ordered application granted. (Whipple) (11-19-80)

11-20-80 Waiver of counsel by witness, Merle Betskoff filed 11-19-80.

11-20-80 Motion of U.S. for order compelling Merle Betskoff to give testimony and other information, etc. filed 11-19-80.

11-20-80 Order directing Merle Betskoff to give testimony and other information before Grand Jury filed 11-19-80. (Whipple)

11-21-80 Order denying motion of U.S. for order to show cause and motion of Art Metal-U.S.A. Inc. to quash subpoena and granting motion of Art Metal-U.S.A. Inc. for protective order, filed 11-20-80. (Stern)

1-25-80 Transcript re holding grand jury witness in contempt, filed.

1-25-80 Transcript re fifth amendment of witness, filed.

12-3-80 Transcript re immunity hearing of Merle Betskoff, filed 12-2-80.

2-4-80 Motion of I. Spiegel for reconsideration of motion to quash subpena and proof of service filed 12-3-80. (brief submitted)

2-10-80 Notification of disclosure of matters occurring before the Grand Jury with sealing order filed 12-9-80. (Fisher) * * *

2-10-80 Motion filed. (Released 3-3-81)

2-10-80 Order filed. (Fisher) (Released 3-3-81)

12-11-80 Motion of U.S. filed 12-10-80. * * *

12-11-80 Order filed 12-10-80. (Fisher) * * *

12-11-80 Ordered minutes, motion, order and reporter's notes sealed. (Fisher) (12-10-80)

12-11-80 Transcript of proceedings held on 11-17-80 for Art Metals filed 12-10-80.

12-11-80 Transcript of proceedings held on 11-17-80 for Irving Spiegel filed 12-10-80.

12-11-80 Certified copy of order from U.S.C.A. re motions for modification of orders pursuant to Rule 35 F.R.A.P., etc. filed 12-10-80.

12-15-80 Affidavit of service of copy of affidavit and brief by U.S. filed 12-12-80.

12-17-80 Motion of U.S. re immunization of witness Rima Saad and to compel testimony, filed.

12-17-80 Order compelling witness Rima Saad to testify before grand jury, filed. (Stern)

12-18-80 Motion of United States of America for an order to show cause why Isadore Spiegel should not be held in contempt for failure to comply with Grand jury summons, filed 12-17-80. (Brief submitted)

12-19-80 Hearing on government's application to compel testimony of Rima Saad. Ordered application granted. Order submitted. (Stern) (12-17-80)

12-22-80 Notification of disclosure of matters occurring before grand jury with sealing order filed 12-19-80. (Fisher) * * *

12-24-80 Hearing on motion by U.S.A. for an order to show cause why I. Spiegel should not be held in contempt for failure to comply with Grand Jury subpoena. Ordered hearing continued to January 9, 1981. (Stern) (12-23-80)

2-24-80 Letter of Stephen D. Feldman, M.D. re medical report of Isadore Spiegel, filed 12-23-80.

12-29-80 Order to show cause why Isadore Spiegel should not be held in contempt for failure to obey a grand jury subpoena ret 12-22-80 filed 12-23-80. (Stern)

1-8-81 Ordered motion, order and court stenographers minutes be sealed. (Sarokin) (1-7-81)

1-8-81 Motion and Order filed 1-7-81. (Sarokin) * * *

1-13-81 Continued hearing on motion of United States of America for an order to show cause why Isadore Spiegel should not be held in contempt for failure to comply with Grand Jury subpoena. Ordered Isadore Spiegel held in contempt of court. Ordered Isadore Spiegel do pay a fine of $100.00 per day until compliance with Grand Jury subpoena. (Stern) (1-9-81)

1-18-81 Ordered execution of order imposing fine stayed until January 16, 1981. (Stern) (1-0-81)

1-13-81 Ordered Isadore Spiegel deposit with the Clerk of the Court under seal the documents requested in Grand Jury Subpoena by January 15, 1981. (Stern) (1-9-81)

1-13-81 Order directing Isadore Spiegel to produce record pursuant to subpoena issued on 10-7-80, and directing clerk to keep said records under seal until subpoena becomes final after appeal, filed 1-9-81. (Stern) Notice Mailed.

1-13-81 Order directing Isadore Spiegel to pay the sum of $100.00 per day until compliance with Grand Jury subpoena; and staying order imposing a fine to 1-16-81, filed 1-9-81. (Stern) (Notice Mailed)

1-13-81 Hearing on motion of Milton Reed to quash Grand Jury Subpoena. Decision reserved. (Sarokin) (1-12-81)

1-13-81 Order denying motion of Isadore Speigel to Quash subpoena dated 10-7-80, filed 1-12-81. (Stern) Notice Mailed.

1-13-81 Order denyuing motion of Isadore Speigel for reconsideration of Order denying motion to Quash Subpoena, filed 1-12-81. (Stern) Notice Mailed.

1-14-81 Transcript of proceedings of December 23, 1980, filed 1-13-81.

1-16-81 Motion to compel testimony filed 1-14-81. * * *

1-16-81 Ordered minutes and papers impounded. (Sarokin) (1-14-81)

1-16-81 Order compelling testimony filed 1-14-81. (Sarokin) * * *

1-16-81 Order impounding Order and all moving papers re motion to compel testimony filed 1-14-81. (Sarokin) * * *

1-16-81 Motion to compel testimony filed 1-14-81. * * *

1-16-81 Order minutes and papers impounded. (Sarokin) (1-14-81)

1-16-81 Order compelling testimony filed 1-14-81. (Sarokin) * * *

1-16-81 Transcript hearing before Hon. Herbert J. Stern, on Jan. 9, 1981, re Isadore Speigel, filed 1-15-81.

1-16-81 Continued hearing re contempt of court re Isadore Spiegel. Ordered fine increased to $600.00 per day until compliance with Grand Jury subponea. (Stern) (1-15-81)

1-16-81 Order Amending Contempt Order re Isadore Spiegel increasing fine to $600.00 a day filed 1-15-81. (Stern) Notice mailed

1-16-81 NOTICE OF APPEAL OF ISADORE SPEIGEL from contempt orders entered 1-12-81 and 1-15-81 filed 1-15-81, at 12:45 p.m.

1-16-81 Copies of Isadore Speigel's Notice of Appeal sent to USCA, U.S. Attorney, and Dept. of Justice.

1-16-81 RECORD ON APPEAL SENT TO U.S.C.A. (NOTICE MAILED) (I. SPEIGEL)

1-19-81 Transcript of January 9, 1981, hearing re Isadore Speigel, filed 1-16-81.

1-19-81 Transcript of January 15, 1981, hearing re Isadore Speigel, filed 1-16-81.

1-19-81 I. SPEIGEL—FIRST SUPPLEMENTAL RECORD ON APPEAL SENT TO USCA. Notice mailed

1-19-81 Order impounding all moving papers re hearing compelling testimony before Judge Sarokin on January 14, 1981, filed. (Sarokin) * * *

1-26-81 Certified copy of order of U.S.C.A. granting motion of Isadore Speigel to stay execution of contempt order dated 1-9-81 pending appeal, etc., filed 1-22-81.

1-28-81 Hearing on application of Milton Reed to quash grand jury subpoena. DECISION RESERVED. (Sarokin) (1-26-81)

1-29-81 Notice of Motion of grand jury witness Robert DiConsiglio to quash grand jury subpoena returnable February 3, 1981, acknowledgement of service, filed 1-28-81. (No Brief)

1-29-81 Notice of Motion of grand jury witness Robert Turk to quash grand jury subpoena returnable February 3, 1981, proof of service, filed 1-28-81. (Brief submitted)

1-29-81 Certification of Barry H. Evenchick in support of Motion to Quash of Robert Turk, filed 1-28-81.

2-2-81 Order for inspection of records under seal filed 1-30-81. (Stern) * * *

2-3-81 Affidavit of Irving Rosen re inspection of records filed.

2-4-81 Ordered minutes and court reporters stenographic notes sealed. (Sarokin) (2-3-81)

2-5-81 Motion on behalf of Isadore Spiegel for return of monies paid pursuant to order of contempt, proof of service, filed 2-4-81. (No Brief)

2-5-81 Opinion filed 2-4-81. (Sarokin) (Granting in part and denying in part motion of Mr. Milton Reid to quash five grand jury subpoenas)

2-19-81 Order granting in part and denying in part motion of Mr. Milton Reid to quash five grand jury subpoenas, filed 2-17-81. (Sarokin)

2-19-81 Motion to compel testimony, filed 2-18-81. * * *

2-19-81 Order denying motion to quash subpoena, filed 2-18-81. (Sarokin) * * *

2-19-81 Order impounding and sealing order denying motion to quash subpoena, filed 2-18-81. (Sarokin) * * *

2-19-81 Motion for reconsideration of order of 2-17-81 granting in part; and denying in part motion of Milton Reid to quash five grand jury subpoenas and Affidavit of Service, filed 2-18-81. (Brief submitted)

2-20-81	Ordered minutes and notes of Court Reporter impounded. (Sarokin) * * * (2-18-81)
2-20-81	Ordered, filed 2-18-81. (Sarokin) * * *
2-20-81	Notice of Motion to quash subpoena ret. Feb. 20, 1931, statement in lieu of brief, proof of service, filed 2-19-81. * * *
2-23-81	Ordered minutes and notes of Court Reporter impounded. (Sarokin) (2-20-81)
2-23-81	Order denying motion to quash subpoena, filed 2-20-81. (Sarokin) * * *
2-23-81	Order impounding and sealing order denying motion to quash subpoena, filed 2-20-81. (Sarokin) * * *
2-24-81	Notification of disclosure of matters occuring before the grand jury with sealing order, filed. (Biunno) * * *
3-2-81	Hearing on motion for reconsideration of order of 2-17-81 granting in part; and denying in part motion of Milton Reid to quash five (5) grand jury subpoenas. Decision Reserved. (Sarokin) (2-27-81)
3-4-81	Order unsealing proceedings of Norman Pell, filed 3-3-81. (Fisher)
3-4-81	Verified Petition and Order impounding and sealing, filed. (Biunno)
3-9-81	Order pursuant to Rule 6(e) and sealing order filed 3-4-81. (Biunno) * *
3-12-81	Notification of disclosure of matters occurring before the grand jury and sealing order filed 3-11-81. (Biunno) * * * *
3-16-81	Certified copy of Order of U.S.C.A. affirming the judgment of the District Court, filed 3-13-81. Notice Mailed. (Appeal of Ernst Orthopedics)
3-20-81	Motion, filed 3-18-81. * * *
3-20-81	Order, filed 3-18-81. * * * (Biunno)
3-20-81	Motion, filed 3-18-81. * * *
3-20-81	Order filed 3-18-81. * * * (Biunno)
3-24-81	Notification of disclosure of matters occuring before the Grand Jury and sealing Order fled 3-23-81. (Biunno) * * *

3-26-81 Notification of disclosure of matters occuring before the Grand Jury and sealing Order filed 3-25-81. (Biunno) * * *

4-1-81 Ordered minutes and stenographic notes sealed. (Biunno) (3-30-81)

4-1-81 Affidavit, filed 3-30-81. * * *

4-8-81 Order denying motion of Milton Reid for reconsideration of motion to quash 5 Grand Jury Subpoenas, filed. (Sarokin)

4-10-81 Supplemental notification of disclosure of matters occurring before Grand Juries, with sealing order, filed 4-9-81.

4-13-81 Government's Notice of Appeal from Order of Judge Sarkokin denying motion for reconsideration filed on 4-8-81, filed 4-10-81.

4-13-81 Copies of Notice of Appeal sent to U.S.C.A., U.S. Attorney and Checki & Politan Esqs.

4-20-81 Hearing on government's motion for a grant of immunity as to witness Norman Pell. Ordered motion granted. (12-10-80) (Fisher) (Unsealed 3-4-81)

4-22-81 RECORD ON APPEAL SENT TO U.S.C.A. (NOTICE MAILED)

4-27-81 ISADORE SPEIGEL—Certified copy of USCA Order in lieu of mandate affirming judgment of the district court filed 4-23-81. (Notice mailed) (Pu USCA Order, received B1412).

4-27-81 ISADORE SPEIGEL—Certified copy of USCA Order granting motion of U.S. for issuance of Mandate (see above) filed 4-23-81.

5-13-81 Notification of disclosure of matters occuring before the grand Jury and sealing Order, filed 5-12-81. * * *

5-13-81 Notification of disclosure of matters occuring before the Grand Jury and sealing Order, filed 5-12-81. * * *

5-18-81 Notification of disclosure of matters occurring before the grand jury with sealing order filed. (Meanor) * * *

5-26-81 Ordered Catherin Ferguson and Christa Ventriglia excused from grand jury service. (Whipple) Notice mailed

5-28-81 Petition and Order for Writ of Habeas Corpus re Kenneth Carter, filed. (Meanor)

5-28-81 Writ re Kenneth Carter issued.

6-4-81 Certified copy of USCA Order granting motion of ISADORE SPEIGEL for Recall and Stay of Mandate for thirty days pending application to the Supreme Court for writ of certiorari filed. (Mandate ret'd 6-4-81)

6-5-81 Notification of Disclosure of Matters occurring before the grand jury with sealing order filed 6-4-81. (Meanor) * * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Misc. 80-53

IN THE MATTER
OF THE GRAND JURY
EMPANELLED MARCH 19, 1980

Newark, New Jersey
January 12, 1981

Before: HON. H. LEE SAROKIN, U.S.D.J.

Appearances: MICHAEL HIMMEL AND
JAMES P. ULWICK,
FOR THE GOVERNMENT.

NICHOLAS POLITAN,
For Milton Reed.

THE COURT: Mr. Ulwick, you may remain seated if that is more comfortable for you.

MR. ULWICK: Well, I will stand up, your Honor.

I think that on this particular motion, although we filed our briefs first, since we anticipated that these issues were going to be raised from discussions that we had had with Mr. Reed's attorney prior to the return date of the subpoenas, and although we did file our brief first the motion is actually Mr. Politan's since it is a motion to quash a subpoena.

Presently the factual situation is that there are four grand jury subpoenas, the return date has passed, Mr. Reed has invoked his Fifth Amendment privilege in response to the questions in the grand jury and presently we are before your Honor on Mr. Politan's motion to quash the subpoenas.

THE COURT: Let me ask you some questions because it might help us focus on the legal questions.

The brief which has been filed on behalf of Mr. Reed suggests that the corporations are really sole proprietorships.

Now, does the Government accept that representation?

MR. ULWICK: For the purpose of this motion, your Honor, there are three actually factual assertions which have been made in Mr. Reed's brief. One is that all the corporations described in the subpoenas are sole proprietorships. We will concede that for the purpose of this argument.

The second is that the possession of these records are in Mr. Reed's hands. We will concede that for the purposes of this argument.

The third is that they are able to be authenticated only by Mr. Reed. We will not concede that point.

The number of these records are bank statements, telephone toll records capable of authentication by sources other than Mr. Reed, such as employees of the bank, telephone company.

In those instances it is incorrect to say that the records are only capable of authentication by Mr. Reed. In fact it may well be that Mr. Reed can not even authenticate the particular hearsay enclosed on, for instance, the bank statements. Bank statements may say that such and such account has such and such balance. Mr. Reed might accept that, might not argue with it, but he would not be able to authenticate that.

THE COURT: Are there any other categories which you say would not be subject to his authentication alone? Bank records and telephone records, what else?

MR. ULWICK: Cancelled checks.

THE COURT: Who else could authenticate the cancelled checks?

MR. ULWICK: The checks themselves, the blank checks could be authenticated by representatives of the bank. Handwriting experts could authenticate the document as being one prepared a particular individual. There are some checks that we have—I don't know whether these particular checks will produce this particular result, but there are occasions where employees of Mr. Reed have prepared checks that were signed by them in their signatory capacity so they could be authenticated by an employee.

THE COURT: Do you also concede that the documents which you seek will or may incriminate Mr. Reed?

MR. ULWICK: Yes, your Honor.

THE COURT: Let me turn to Mr. Politan. At least we know what is conceded and what is in issue, and I will hear from you.

MR. POLITAN: Yes. If your Honor please, just as to number 1, your Honor initially referred to various companies as being corporations, there are some of these companies which are not corporations. Most of them are not, that are the subject matter of this particular application.

THE COURT: But I take it that's not an issue because the Government concedes that whether they are corporations or partnerships they will betreated for the purposes of this argument as though they were a sole proprietorship; is that correct?

MR. ULWICK: Yes.

THE COURT: So we don't have to distinguish between them.

MR. POLITAN: Because I see distinctions and differences, I see distinctions between sole proprietorships and corporations.

THE COURT: If the Government didn't take that position my next question would have been do we have to have a hearing as to each of those to determine whether they are truly a sole proprietorship, but that's now moot. It has been conceded, so you don't have to address that.

MR. POLITAN: As I view the facts basically as have been outlined by your Honor, as I read the case law, I fail to find one single solitary case that says that a man must be compelled to surrender to a grand jury documents in his possession, albeit private papers or papers in his possession which may tend to incriminate him. I have gone through the Supreme Court cases and I have gone through the Third Circuit cases. I don't see it.

I see many, many exceptions to the Boyd rule as applies to subpoeans which are served upon third parties who are forced to surrender documents of an individual notwithstanding a claim of Fifth Amendment privilege by the indi-

vidual, and the most famous of which at this point is a Callucio case where the very same papers that Judge Garth said would not be obtainable from the individual who coaimed the privilege as a sole proprietor could be obtained from his office manager, if I were to read all these cases and if I were to put one single thread which runs through them all, it is first of all a question of possession, and who has that possession.

THE COURT: That is conceded in this case.

MR. POLITAN: Once we are at that point, your Honor, I can stand here and talk for the next half hour, but I submit to your Honor that the Government can not come forth before this Court and cite one case by the Supreme Court of the United States, or one case by the Third Circuit Court of Appeals which has said that an individual can be compelled to surrender his private papers or sole proprietorship records to a grand jury.

THE COURT: I guess that one of the arguments they might make, and it has nothing to do with the application for a court order, but there is probably a practical aspect to this, and that is if you concede that at least as to the bank records and the telephone records and possibly the cancelled checks they could get those documents by subpoenaing a third person, why the fuss?

MR. POLITAN: The defendant, faced with being the target of a grand jury investigation, is not required by the Constitution or by any other rule of niceties to help his accuser gather evidence and put it in a proper form to present it to a grand jury so that an indictment can be rendered against him. That's what it is all about.

THE COURT: I can't quarrel with that. I think certainly you have to separate out the practical considerations and you'd have to advise your client based upon the law what the real legal issues are here. That's why I originally turned to Mr. Ulwick, because at least tentatively I think you are right.

So if I can switch back to Mr. Ulwick, as I understand it, Mr. Ulwick, the primary basis of Mr. Reed's argument is that if he has possession of a document which may incrimi-

nate him he is under no obligation to turn that document over, I can not compel him to turn it over.

The exceptions talk about, if possession is with someone else, or if there was a contention that they do not incriminate, which is not in this case, but the mere fact that someone else can authenticate the documents merely means what I suggested to Mr. Politan like be a practical effect, and that is if I take the position that he is right, they probably can get that documentation through other means, but that doesn't mean that he has to be practical and save you work. He may say, that's right, but that's my right and my client's right, and therefore, if you intend to obtain that information you have got to get it from some other place.

MR. ULWICK: If the particular sweeping proposition that Mr. Politan advocates were true then we would not have the case of Schwaber versus California, Wade, Dinizzo and other cases where the defendant has been compelled to provide evidence to the Government over his Fifth Amendment objection, giving blood samples, voice exemplars, handwriting exemplars, walking a certain way, talking in a certain way, things like that. There is no question under the Fifth Amendment cases as decided by the Supreme Court that a defendant or suspect or target may be compelled to do certain things which will aid the prosecution over his claims of Fifth Amendment privilege, and the reason, the distinguishing factor, is it is not considered testimonial communication. And I think that that is particularly important in this particular case.

Now, Mr. Politan has stated, and I would take issue with this, he says there are no cases that have required an individual or say that an individual is required to produce his own papers, and Mr. Politan said private papers. That's another thing I would take issue with here. We are not talking about private papers here. We are talking about business papers, papers prepared by third party.

THE COURT: What about the possession of those documents, could that incriminate Mr. Reed?

MR. ULWICK: In the Fisher Court they raised that particular issue, and they said in that particular case the ac-

knowledgment of possession did not rise to a level of Fifth Amendment violation.

I would suggest that that is exactly what we have here. Mr. Politan in most of those cases does not seriously dispute the existence of the particular documents. We have named exact accounts, in some cases with the account numbers, location of the bank, name of the bank. There is not really a dispute as to whether those documents exist.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Misc. 80-53

IN THE MATTER
OF THE GRAND JURY
EMPANNELLED MARCH 19, 1980.

NEWARK, NEW JERSEY
JAN 26, 1981

Before: HON. H. LEE SAROKIN, U.S.D.J.

Appearances: MICHAEL HIMMEL and
JAMES P. ULWICK
For the Government.

NICHOLAS POLITAN
For Milton Reed.

THE COURT: Well, if you are taking the position that the act of turn-over is not testimonial, then I assume at the trial you couldn't turn it into something that was testimonial; I think that is logically consistent.

MR. ULWICK: If I might have a moment to think about it—

THE COURT: And discuss it, please do.

MR. ULWICK: Your Honor, I think that we would certainly abide by the decision or we would agree not to, if Mr. Reed chose to appear in the grand jury and produce documents there, we would not use any testimony necessary for that production against him at a later time.

Perhaps it would be simpler if your Honor orders him to turn the documents over to the attorney so that the attorney can represent to the Court, "I am hereby turning over the documents that were ordered—"

* * * *

THE COURT: Let me ask you as a practical matter, suppose the Government exercises its right for a subpoena before the grand jury and makes a representation that they can authenticate a particular document and that the act of turn-over won't constitute authentification by the person turning it over. When the trial comes can the Government

then turn to that person and say, "Okay, didn't you have this in your possession and isn't this your signature? You turned it over to us."

What if somebody jumps up and says, "Wait a minute, you got that under—" isn't there control which follows?

MR. POLITAN: Number one, your Honor must never in the context we are now operating in, we theoretically have a grand jury who is sitting there and a grand jury theoretically is weighing whether or not to indict this particular defendant. That grand jury is going to see or hear the witness turn over the records. The grand jury becomes tainted now.

THE COURT: Whataabout the suggestion that if I were to order the turn-over you can turn it over.

MR. POLITAN: No, your Honor, for this simple reason; the compulsion comes from the subpoena. The subpoena is issued through the grand jury. It can't be done, although in other contexts it is done this way, it can't be done this way in the formal exercise of the subpoena.

We are here for your Honor to determine whether or not the subpoena is to be complied with or not complied with. The subpoena is not to the U.S. Attorney's office, but to the grand jury, who are presumably sitting unbiasedly gathering evidence and determining whether or not there should or should not be an indictment of this defendant. That means that this defendant has got to go to that grand juryroom and he has got to acknowledge, there is a subpoena returnable for the production of whatever, check books, do you have the subpoenaed check books of Milton Reed?

Yes, Mr. so and so.

And he turns it over.

There is an act of testimony before the grand jury. The grand jury is tainted already. That's just for starters, your Honor.

And then we go on from there and down the line maybe the person comes to trial, and during the course of the trial information may have been gleaned from that testimonial presentation which helped the Government prepare its case. And we don't even know, we are the defense, we don't know about an agreement and at the trial comes the

question from the Government, Mr. Reed, did you turn these over to the grand jury, or however the question comes up.

Defense counsel objects, and the Government says, oh, I am sorry, and the trial Judge is in the seventh day of trial, and I say mistrial, and the trial Judge weighs the practicalities of it and says, well, what am I going to do, waste seven days of the jury's and Court's time and everybody's time over this issue?

And yet that issue will have affected that jury in the course of the trial. That's the purpose of these Fifth Amendment rights and other rights. It is not to block the system of justice, but it is to say to the system of justice as represented by the United States Attorney, the grand jury and ultimately the court system, an individual is entitled to sit there with his mouth closed and do absolutely nothing and he is entitled to sit there and not produce any of his personal records at anytime, at any stage of the proceedings, and let the Government go its very way, and if the Government prevails and he has committed a crime or crimes and they gather their evidence and they have presented it to a grand jury, and they have gotten an indictment and they go to court and put witnesses on the stand and he is convicted, that is the American system of jurisprudence., and that's what we are talking about.

THE COURT: You don't have much quarrel with me. As I said before I read those cases I would have said that would be my view of the law, but I am obligated to follow the Third Circuit decisions and the Supreme Court decisions, and I am not so sure that they agree with your position.

Let me go back to Mr. Ulwick for a minute. Mr. Ulwick, you have to give me some help. What is the practical effect of your saying to me, turning over those documents won't constitute an admission by the target that he has possession or that he authenticates them in any way either by saying that they are mine or that they are in response to a particular demand; how does that work as a practical matter? Mr. Politan suggests that a subpoena is served upon the man, he has to come to the grand jury and produce

them. The minute he turns them over can't the grand jury say he had got them, he has possession of them, they are supposed to be cancelled checks, therefore, he is authenticating his signature on the checks; how do you accomplish this as a practical matter?

MR. ULWICK: We are presently in a position where the Court is considering a motion to quash, and out of this hearing will come an order from your Honor either denying the motion to quash and ordering it produced or granting the motion to quash.

Assuming your Honor decides to deny the motion to quash and orders Mr. Reed to produce the documents, that order can be fashioned in such a way by your Honor to prevent the kind of problems that Mr. Politan foresees.

For example, Mr. Reed could produce the documents to the agents of the grand jury, one of the special agents of the FBI—

THE COURT: Mr. Politan's argument is the grand jury has already issued the subpoena to Mr. Reed. Now, they are intelligent people. All of a sudden these books and records are going to show up.

Would the grand jury say, well, obviously there has been compliance with the subpoena and here are Mr. Reed's records, they must have been in his possession, he has authenticated them. We have given him a list and he has them and he has turned them all over.

Therefore, all of the things you say we can rule out as not being testimonial are clearly in.

MR. ULWICK: Your Honor, there are a number of distinctions I think that have to be made.

First and foremost is that the grand jury can receive all kinds of evidence. The Supreme Court has even said that it can receive hearsay, it can receive illegally seized evidence and not be subject to taint proceedings and the kind of things that Mr. Politan mentioned.

So I am not sure that there is an enforceable right by Mr. Politan in arguing that the grand jury would somehow be tainted by considering evidence which may have been obtained through compulsion.

I am arguing there may be no taint. The grand jury receives documents constantly. So I suggest that there would not be the taint problem that Mr. Politan suggests.

In terms of the practical situation considerations your Honor has raised, as I was saying before, the order for delivery by this Court can be fashioned in such a way that it doesn't necessarily have to say just, deny your motion, or grant your motion, it can be fixed by your Honor in such way that your Honor can tailor the order to the necessities of this particular case.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Misc. 80-53

IN THE MATTER OF THE
GRAND JURY ENPANELLED
MARCH 19, 1980

Newark, New Jersey
February 27, 1981

Before: H. LEE SAROKIN, U.S.D.J.

Appearances: MARYANNE DESMOND, AUSA, and
MICHAEL HIMMEL, AUSA,
For the Government.

NICHOLAS POLITAN,
Fpr Milton Reed.

THE COURT: Good morning.

MRS. DESMOND: Good morning, your Honor. Initially I would like to thank the Court for permitting us to reargue this case. We believe the issue presented, particularly the facts of this case, the decision that yor Honored rendered, is in part incorrect.

We believe it important to attempt to correct that decision for the purposes of Grand Jury administraton and because if the Court were to continue in its ruling it would stand alone in this district; therefore, I would like to—I did want to file a brief, which your Honor has accepted, setting forth the law as explicitly and as fully as I could, and I am here today to respond to your Honor's questions and to present a few additional observations.

Now, that having been said, that we are grateful for the opportunity to come back and that we appreciate the opportunity to file a comprehensive brief, I will withdraw because at the risk of guessing what your Honor would wish me to do incorrectly we will not rehash the brief. I think that all parties agree as to what the cases say. I think it would probably not benefit any of us to probably start going through it case by case, so with the Court's permission I would just make a couple of observations:

1, we are not here on any question of privilege with reference to the contents of the documents. Your Honor correctly observed that in your opinion. The issue before the Court is the act of production, whether that act of production is protected, if a witness has a right to be protected from the act of production because that act would be testimonial, incriminatory and compelled.

All three I must remind the Court are required.

We have argued in the brief that on no level does he meet the test, but I must now withdraw from the brief to make one comment.

Thus far in this matter it has been treated as if it were the Government's burden to show that there is no Fifth Amendment right. We have all been treating it that way. I think it is time to step back and look at it somewhat differently and more correctly, which is that it is the witness's burden to show why the Fifth amendment right applies, if in fact it does.

He has made utterly no showing on this ground. I cite to your Honor Hoffman versus U.S., a case which I think your Honor must take into account and which I think all parties know that the burden is in fact the witness's to come forward to make the showing.

I quote from Hoffman at page 480 and interpose the word "production" for the word "answer."

The Fifth Amendment's protection must be confined to instances where the witness has reasonable cause to apprehend danger from producton. The witness is not exonerated from producing merely becase he declares that in so doing he would incriminate himself. His say so does not in itself establish the hazard of incrimination. It is for the Court to say whether the failure to produce is justified and to require him to produce if it is not. He must make that showing.

I suggest to your Honor no showing has been made other than a say so, and through your Honor I would call on Mr. Politan now to make that showing under Hoffman.

I am fully prepared after that has been done to show why we believe that the privilege does not apply, and I am fully

prepared to do so now if your Honor does not require the showing of Mr. Politan.

THE COURT: Let me ask you this, let's put aside the question of burden for a moment and although we have been through this two or three times I don't hesitate to do it again because as I candidly conceded to counsel it is an entirely new field for me so I appreciate all of the help that I can get. Whenever this matter has been argued the Government has taken the position that the sting of turning these over is somehow eradicated by reason of the Government's ability, for instance, to otherwise prove things such as authentication, possession and existence of the documents, and when other counsel has been here for the Government I said on each occasion, I don't know, how do you implement that if there has been a subpoena issued by the Grand Jury? If there is compliance the Grand Jury certainly can infer possession, existence and authentication by the target, and I don't know, and it has never been explained to me, what is the significance then of the Government saying we can otherwise prove those things, because the Grand Jury having issued a subpoena and having the documents turned over would have a perfect right then to say, well, obviously the target possessed them, has authenticated them and has recognized and identified them; what is the significance of the Government saying, we can otherwise prove it?

MRS. DESMOND: Except this, your Honor, and I think this is something that precedes that question: if in fact the act of production does not violate his Fifth Amendment right then it doesn't matter what the Grand Jury thinks, so that the showing must be before your Honor that, A, he has possession; B, that the documents exist; C, the Government can otherwise authenticate.

If he can not make that showing then there is no Fifth Amendment privilege and it doesn't matter what the Grand Jury would think, in other words, there is no Fifth Amendment privilege to protect.

We have argued—and I think the argument becomes clearer on receipt of the reply brief which I received last evening—that in fact all—less than all of the documents

are conceded to exist explicitly. All of the documents are conceded to exist implicitly. There is a direct concession that if the documents exist he possesses them, the Government has said that as to documents the witness did not prepare they can be authenticated by other people, as to documents he did not prepare they can not be authenticated by him, and as to documents he did prepare and can authenticate we can authenticate through other witnesses.

So that there is no suggestion and no tacit concession that springs from these three branches of showing that the production would be testimonial, that would give him the right to assert Fifth Amendment protection in the first place.

THE COURT: That's why I asked—let me go back to the question I asked before, then: let's assume—and of course, it is very difficult at this stage for the Court to make a determination, for instance, whether or not authentication is a crucial element of this evidence—but let's assume for the purpose of our discussion that it is, that to authenticate these documents is crucial to the presentation to the Grand Jury, and that the act of turning over in the absence of independent evidence that the Government has would constitute an authentication by the target. Let's take that assumption.

MRS. DESMOND: In other words, we will assume for argument that there is a Fifth Amendment right to be protected?

THE COURT: Yes. The authentication, let's assume that.

Now, if we get to that point and the Government then says, well, take that element away because we can prove authentication—and I come back to the same thing I have asked, I think this is a third time, third hearing—what difference does that make? If the act of turning it over by the target is a concession of authentication what difference does it make that the Government can also prove authentication, if a Grand Jury can conclude by the target turning it over that he is authenticating it, how does a Grand Jury know that the Government can otherwise authenticate it?

How do I know that the Grand Jury will not rely on the act of turn over as the authentication?

MRS. DESMOND: Well, of course, the easy answer to that and the answer I am sure you will get quickly is the immunity that the Government has offered.

THE COURT: Nobody has offered that. I asked that question at all of the prior hearings, in other words,and I kept saying how is it implemented, and the word "immunity" was never used. In fact there was even a suggestion that the act of turn-over could be utilized at the trial of this case, for instance, if the defendant elected to take the stand.

MRS. DESMOND: That is a suggestion that I must correct, and I am prepared to do so, I would not have left this courtroom this morning without correcting that misimpression that was given. It was in answer to a question your Honor asked and it was a reasonable answer given, the Harris line of cases.

Let me just deal with that immediately as long as we are there. New Jersey—I have the cases here, Supreme Court Reports 99 Supreme Court 1292, the holding of that case is that respondent's testimony—and he was testifying under a New Jersey State grant of immunity could not constitutionally be used against him in the later criminal trial, could not be used to impeach him. Mr. Politan, if he is indicted and if he goes to trial both prereqisites, of course, for the question your Honor has posed, could under Portash take the stand and say under a grant of immunity I did not produce the documents, and we can not cross examine him on that.

Portash clearly protects him from that type of cross examination at trial. That I know was a concern of your Honor's in the opinion.

THE COURT: Let me say this, Mrs. Desmond: I think in our prior discussions with the Government that I indicated that if there was some way that I could be assured that the act of turn-over would not be utilized against a target for the reasons of authentication establishing that he had possession or that it was an acknowledgment of the identity and existence of the document, that if the Government

could assure me that that could be accomplished realistically then I would order the turn-over. And I was not satisfied after the colloquy with Government counsel that it could be accomplished. And that's why we always come back to that question, if you tell me that the Government can authenticate it otherwise, how do I know, how can I be assured that the act of turn-over will not be utilized against the target for authentication purposes? And I never had that issue resolved to my satisfaction.

If you can resolve it to my satisfaction I have no hesitancy in saying, yes, I will direct the turn-over, but only on the condition that the act of turn-over will not be utilized against the target.

And I think Mr. Politan would agree that if he had that assurance then there is no problem.

MRS. DESMOND: Let me just preface, though, what I would say as to that with this comment: there is no reason to afford immunity if there is no Fifth Amendment, valie Fifth Amendment privilege asserted. So, again, the question assumes that the witness has asserted a valid Fifth Amendment privilege. But assuming that, arguendo, the government has represented in court that it will not use the act of production against him, assuming Fifth Amendment privilege.

THE COURT: What good is that?

MRS. DESMOND: That representation, frankly, I believe was made out of an excess of caution, I believe it is because the Government did not want to go through proceedings like this, the investigation must move forward, and we are delaying it ourselves by coming back to you, but we feel the issue is important enough.

And the representation, therefore, was made that the acts would not be used against him.

I myself to the extent it has any weight at all would have not made that representation because I don't believe there is Fifth Amendment protection here. There is nothing as to which immunity should be afforded. But the representation was made.

Your Honor seems to suggest—and I don't think you mean to—that your good faith representation might be violated.

* * * *

THE COURT: What concerns me in that is the realities of life that the compliance with the subpoena and in the absence of something very definitive from me would permit the Grand Jury to do something which we say they shouldn't do, namely, to draw some conclusion from the act of turn-over.

If I were satisfied that that would be the result then I think I have indicated before I would be much more inclined to grant the—

MRS. DESMOND: I am not aware of the fact, your Honor, I think I am correct when I say that I don't think Judge Stern incorporated such a provision into the order in the Spiegel case, I don't think it is required.

THE COURT: That's clearly the legal effect of it, it is not?

MRS. DESMOND: The legal effect would be as if you had incorporated it in your order whether or not you do.

THE COURT: That's something we can talk about.

As long as you concede that's the effect of it we can decide whether it should or should not be in the order.

Thank you for the excellent briefs. As I said before, you know how I have struggled with this. I think it justifies that struggle.

Mr. Politan, I would like you to answer the question posed by Mrs. Desmond, namely, that is whether or not you have satisfied the burden that the act of turn-over would be testimonial.

MR. POLITAN: Your Honor, I would respectfully refer your Honor in the first instance to the affidavit of Assistant United States Attorney Michael Himmel which accompanied the motion before your Honor and the contents of that affidavit alone, if your Honor please, indicate the natrue of the records, the incriminatory nature of the records and the allegations made by the Government, and I would quote from paragraph 3:

"I am presently assigned to assist the Grand Jury in an investigation in the District Court of New Jersey concerning alleged violations of title 18 U.S. Code section 371, conspiracy, 1001, false statements, 1341, mail fraud, 1951, bribery and extortion, title 25 violation of the Internal Revenue laws and related offenses by Milton Reed and others arising out of the submission of bids—" and your Honor will recall that bid documents were requested—"bid bonds"—your Honor will recall they were requested—and price quotes by various companies to Hudson County and municipal entities thereof, the awarding of bids and contracts by Hudson County and municipalities thereof to said companies and the diversion of income by said companies to circumvent the Internal Revenue laws," and he goes on further.

THE COURT: May I interrupt?

All those things go to the contents of the document. We are way past that. The fact that the documents are incriminatory has nothing to do with the issue here.

The question is how will the turn-over, the act of turning the documents over, incriminate your client?

MR. POLITAN: That's the next paragraph of this affidavit which I think goes towards answering that question:

"Among other allegations the records under subpooena are relevant to the allegation that Milton Reed has maintained bank accounts in the United States, Puerto Rico and the Cayman Islands under the name of sham companies and fictitious individuals for the purpose of concealing income. Moreover, the records under subpoena would substantiate the allegation that certain companies are in fact sham companies."

That goes beyond, if your Honor please, the fact that they are incriminatory per se, vis-a-vis their content.

It also says that Milton—the allegation is that Milton Reed maintained these companies, that he has possession of these records and that they are in fact being used by him, so that he when he goes to the Grand Jury and he turns over—we have to always assume arguendo that there are records and that they are going to be turned over—when he goes to that Grand Jury and he turns over that record he

in fact is making one step in the incriminatory process, he is admitting, as your Honor said in his opinion, the existence of the document, the possession of the document, and that the document requested in the Grand Jury subpoena is in fact the document he is in fact turning over.

He has satisfied those three criteria that your Honor says go into the question of self-incrimination in the matter.

I submit to your Honor that that's the very—and there is no blunt the effect of that. I listened to Mrs. Desmond's argument this morning and she was talking about shadings, it seemed to me, shadings of incrimination and blunting this and blunting that. We can't take away from the Fifth Amendment right where we have an admitted target of a Grand Jury investigation, we can't say that we will give you some sort of representation—and I don't question at all, if your Honor please, the integrity of the United States Attorney's office—but they say we will give you a representation that these matters have—and I use Mrs. Desmond's words in her brief, and she never reaches the question of immunity per se, she says on page 22, second line:

"We will not use the act of production against Mr. Reed in any manner, the functional equivalent of use immunity," whatever that means.

We can't blunt, if you will, the violative effect of the production of the record by talking about the immunity. Mrs. Desmond said we will tell the Grand Jury that we gave him immunity over that. That's going to infect that Grand Jury process.

It is like curative instructions to a jury; there are certain acts which occur which are so devastating during the course of the trial that notwithstanding the most eloquent and best kind of erasure instructions to a jury given at the very moment the Judge is compelled to declare a mistrial because it is so damaging, it is so impactuous upon their thinking process, and there is no way, if your Honor please, that matters can be brought and given to the Grand Jury which are in Reed's possession where the effect of the possession and the turn-over can be blunted. It just can't be, if your Honor please.

THE COURT: You are suggesting that even if I incorporated the Government's suggestion into an order, namely, I am directing your client to turn over the records but under no circumstances is the turn-over of those records to be utilized for any purpose against him either before the Grand Jury or in an indictment before a trial jury, if there is an indictment, you say that can not really be effectuated?

MR. POLITAN: That's right. Plus we can't look into the minds of the Grand Jury and see what an effect it had as to whether or not it should or should not vote an indictment in a particular matter.

We have no way to police it through the Grand Jury stage.

But as your Honor say, that you can not use the production turn-over in the deliberation on whether or not an indictment should be rendered and if any element of the charge that you are going to put against the individual contains either a knowledge of possession or a possession factor that, therefore, you can't indict for that, I think, number 1, you'd be going into the Grand Jury and you wouldn't really have the true Grand Jury process anymore because a Grand Jury would not be free to consider good evidence which comes before it because it would have to worry about it and query whether or not in their subconscious had they either been instructed by a court order or an assistant U.S. Attorney or maybe we can get a procedure whereby defendant's counsel could go in there with the U.S. Attorney to make sure it is done properly, which I am sure the U.S. Attorney wouldn't want to do, we have got a mass of confusion.

THE COURT: Doesn't that risk occur every time immunity is granted?

MR. POLITAN: Not in a Grand Jury setting, not vis-a-vis the individual.

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In the Supreme Court of the United States

No. 82-786

UNITED STATES, PETITIONER,

v.

JOHN DOE

ORDER ALLOWING CERTIORARI. Filed May 2, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.